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No. 91-258

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

R. G. Borg, Warden, ***Petitioner,***

v.

Ricardo H. Robinson, ***Respondent.***

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, AND WASHINGTON, AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rationale of *Stone* v. *Powell,* 428 U.S. 465 (1976), ordinarily precluding federal *habeas corpus* review of Fourth Amendment Exclusionary Rule claims raised by state prisoners, also forecloses federal *habeas corpus* inquiry into a state prisoner's evidentiary claim under *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and its progeny, when the *Miranda*-based claim is unaccompanied by any assertion or proof that the challenged evidence of the prisoner's statements had been obtained from him through coercion and the prisoner had enjoyed a full and fair opportunity to litigate the claim in state court.

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INTERESTS OF AMICI CURIAE

Amici Curiae are states concerned with the finality and enforceability of their courts' criminal judgments. Amici support the position of R. G. Borg for a writ of certiorari in the belief that extending the rule of *Stone v. Powell,* 428 U.S. 465 (1976), to Fifth Amendment claims as suggested by the state of California would substantially improve the administration of state criminal justice systems.

ARGUMENT

The Court's decision in *Stone v. Powell,* 428 U.S. 465 (1976), was premised in part on the principle that the exclusion of unlawfully seized evidence is neither a personal right nor a necessary incident of accurate factfinding.

> The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights. . . . It is not calculated to redress the injury to the privacy of the victim of the search and seizure. . . . [D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. As in the case of any remedial device, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. [Citation omitted.]" *Stone v. Powell,* 428 U.S. at 486-487.

Stone v. Powell takes account of both the limited usefulness of federal constitutional collateral review of state court decisions settling Fourth Amendment claims and "the acknowledged costs [of the exclusionary rule] to other values vital to a rational system of criminal justice." 428 U.S. at 494. By its decision, the Court took the sensible step of mitigating an unnecessary intrusion into the finality of state court judgments. There is no reason to think -- certainly none has been suggested by the Ninth Circuit Court of Appeals -- that the decision in *Stone v. Powell* has diminished the efficacy of the Fourth Amendment.

It is well past time to fully explore the implications of a ruling that 'the rationale of *Stone* should be applied to those Fifth and Sixth Amendment claims or classes of claims that . . . closely parallel claims under the Fourth Amendment . . . ." *Brewer v. Williams,* 430 U.S. 387, 413-414 (1976) (Powell, J., concurring).

The evidentiary exclusion of *Miranda v. Arizona,* 384 U.S. 436 (1966), bars more than involuntary statements. It operates to prevent the use of any statement taken during custodial interrogation if *Miranda* warnings have not been given or have been defectively given, even in minor particulars. As is the case with the Fourth Amendment rule of exclusion, the *Miranda* rule, at least when it is applied to voluntary statements, has no purpose to protect the defendant individually, to insure his right to a fair trial, or to preserve the accuracy of the fact-finding function of the trial. Like the Fourth Amendment exclusionary rule, the collateral consequences of *Miranda* exclusions often include the promotion of unfair trials and inaccurate results because the operation of the rule can mean the exclusion of highly reliable evidence and the acquittal of plainly guilty offenders. See *Stone v. Powell, supra.*

The purposes of *Miranda v. Arizona* are completely served when state procedure affords the defendant a full opportunity to litigate his Fifth and Sixth Amendment claims in state court. State courts routinely give solemn consideration not only to valid *Miranda*-based claims for relief, but to every imaginable extension of *Miranda* as well. For example, state courts have considered assertions that an arrestee was entitled to *Miranda* warnings before giving booking information to an arresting officer, *State v. Jeney,* 163 Ariz. 293, 787 P.2d 1089 (Ariz. App. 1989), that *Miranda* warnings must be tape recorded and contemporaneously memorialized in writing as an aspect of "fundamental fairness," *People v. Marshall,* 50 Cal.3d 907, 790 P.2d 676 (Cal. 1990), and that *Miranda* required suppression of a spontaneous confession to murder given by a person who reported hearing voices telling him to do so, *Colorado v. Connelly,*

479 U.S. 157 (1986). The willingness of state courts to consider *Miranda* claims and to expansively construe the *Miranda* rule seems to have been anything but grudging. Cf. *People v. Horn,* 790 P.2d 816 (Colo. 1990)(holding that whether one is in custody for *Miranda* purposes must be determined by litigating the factual question whether a defendant has been deprived of his liberty in a significant way); *State v. Valdez,* 117 Idaho 302, 787 P.2d 288 (Idaho App. 1989)(holding that admissions made after *Miranda* warnings and waiver of rights would nevertheless be excluded because the defendant earlier had accepted a court's offer to appoint counsel); *Light v. State,* 547 N.E..2d 1073 (Indiana 1989)(reviewing numerous factors to be considered in determining the voluntariness of statements given during custodial interrogation); *State v. McQuay,* 154 Wis.2d 116, 452 N.W.2d 377 (Wisc. 1990)(considering whether a presentence interview was accusatorial in nature and thus subject to *Miranda*). It cannot reasonably be argued that state processes are inadequate to protect the rights against compulsory self-incrimination and to the assistance of counsel.

The Ninth Circuit Court of Appeals went beyond anything necessary to insure that federal rights are respected in state courts when it held that Robinson was entitled by *Miranda* to be protected from the consequences of his calculating, con-wise effort to persuade the police he had nothing to do with the murder of Patricia Worrell. This case turned in the Court of Appeals on subjective values advocated by a majority of the panel which sat in judgment on the work of the California courts. Two members of the panel which decided this case found that Robinson's statement, "I have to get me a good lawyer, man. Can I make a

phone call?," followed by a phone call to his mother before Robinson continued with his original intent to answer questions outside the presence of counsel, somehow amounted to an unequivocal demand for counsel. A dissenting judge considered the circumstances indicative of an *equivocal* request for counsel because ambiguity was created by Robinson's reference to getting a lawyer "made in the midst of a continuing conversation *preceded by* a waiver and an express willingness to talk." *Robinson v. Borg,* slip op., p. 15167. There is no objective reason to consider any of these views a necessary improvement upon the resolution of Robinson's *Miranda* claims by the California courts. In fact, there is a striking contrast between the way Robinson's case was decided in the court of appeals and this Court's focus in cases involving uncertainties about the environment in which an interrogation has taken place. In *Arizona v. Mauro,* 481 U.S. 520 (1987), the police, after trying to discourage a suspect's wife from visiting him, agreed only on the condition that a police officer be present with a tape recorder. The tape recording was later used in evidence against the defendant. Relying on *Rhode Island v. Innis,* 446 U.S. 291 (1980), and the theory that the police conduct was reasonably likely to invoke an incriminating response, the Arizona Supreme Court concluded that the recording was not properly admitted at trial. This Court reversed, holding that it doubted "that a suspect, told by officers that his wife would be allowed to speak to him, would feel he was being coerced to incriminate himself in any way." 481 U.S. at 528.

The underlying question was seen as one concerned with the coercive effect of the disputed police conduct:

> In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards:* Preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. 481 U.S. at 529-530.

Cf. *Papile v. Hernandez,* 697 F.Supp. 626 (E.D. N.Y. 1988)(police response to petitioner's offer of a deal by asking the question "what kind of deal?" did "not carry even the slightest suggestion of the coercion, manipulation or trickery which concerned the Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 . . . .").

While this Court was concerned in *Mauro* with whether it could plausibly be found that the defendant was coerced to incriminate himself, the majority below applied a technical and unrealistic interpretation of federal law to undo the conviction of a dangerous killer.

This case is not untypical. *Miranda* is often applied in federal courts in a manner which makes of the rule little more than a device by which federal judges may substitute their own subjective views for the equally reasonable views of state judges. See, e.g., *Towne v. Dugger,* 899 F.2d 1104 (11th Cir. 1990).

No deterrent to the intentional violation of the right against self-incrimination can forseeably arise from a system of federal collateral review which allows for the suppression of a clearly voluntary statement accompanied by a *Miranda* waiver merely because the defendant has paused during the conversation to consider out loud whether to get a lawyer. In the concurring opinion in *Duckworth v. Eagan,* 492 U.S. 195 (1989), it was observed that the decision in *Stone v. Powell* was

motivated by the Court's recognition that federal habeas review of Fourth Amendment claims already litigated in state courts was of doubtful value.

> In *Stone,* we found that application of the exclusionary rule to Fourth Amendment violations on federal habeas was likely to have only marginal effectiveness in deterring police misconduct, while offending important principles of federalism and finality in the criminal law which have long informed the federal courts's exercise of habeas jurisdiction. In my view this same weighing process leads ineluctably to the conclusion that the suppression remedy should not be available on federal habeas where the state courts have accorded a petitioner a full and fair opportunity to litigate a claim that *Miranda* warnings were not given or were somehow deficient. Indeed, the scales appear to me to tip further toward finality and repose in this context than in *Stone* itself. *Duckworth v. Eagan,* 492 U.S. at 208-209 (O'Connor, J., and Scalia, J., concurring).

The analysis in the concurring opinion in *Eagan* also reflects another reason for barring claims like the one raised by Robinson in this case. Besides the question of efficacy and *habeas* policy, collateral review of state prisoners' *Miranda* claims raises a basic jurisdictional question under 28 U.S.C. § 2254. That statute grants federal courts jurisdiction to entertain *habeas corpus* petitions brought by prisoners "in custody in violation of the Constitution, laws or treaties of the United States." To the extent that the *Miranda* rule "sweeps more

broadly than the Fifth Amendment itself" and "may be triggered in the absence of a Fifth Amendment violation," see *Oregon* v. *Elstad,* 470 U.S. 298, 306-310 (1985), it does not confer a constitutional right. See *Duckworth* v. *Eagan*, *supra*, 492 U.S. at 209-210 (concurring op.). Non-constitutional, non-coercive violations of *Miranda*, then, are not cognizable under § 2254 in the first place.

This is a highly appropriate time for the Court to look closely at the enforcement of *Miranda v. Arizona* by the state courts and to conclude that the rationale of *Stone v. Powell* applies with even greater force in this context. Federal habeas review is an increasingly intrusive obstacle to the enforcement of fair and reliable state court judgments. It is true, as Justice Kennedy points out in *McCleskey v. Zant,* _____ U.S. _____, 113 L.Ed.2d 517, 543 (1991), that "perpetual disrespect for the finality of convictions disparages the entire criminal justice system." For this reason, the Court should not further delay the extension of *Stone v. Powell* to claimed violations of the Fifth and Sixth Amendments.

CONCLUSION

The Court should grant the petition of R. G. Borg, Warden, for a writ of certiorari and should grant the relief for which petitioner prays.

Respectfully submitted,

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